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PROCEDURES AND MECHANISMS RELATING TO COMPLIANCE UNDER THE KYOTO PROTOCOL

Proposals from the co-chairmen of the Joint Working Group on Compliance

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I. INTRODUCTION

A. Mandate

1. At the twelfth sessions of the subsidiary bodies, the Joint Working Group on Compliance (JWG) requested the co-chairmen, with the assistance of the secretariat, to further develop the text on procedures and mechanisms relating to a compliance system under the Kyoto Protocol contained in the annex to the report of the JWG,[1] to serve as the basis for negotiation, along with inputs from Parties, at the thirteenth sessions of the subsidiary bodies.

B. Scope of the note

2. In order to fulfil their mandate, the co-chairmen held informal consultations. The text on compliance contained in this note is based on those consultations, as well as on the outcome of the work of the JWG at the twelfth sessions of the subsidiary bodies. The text reflects ongoing development of views in areas such as objectives, functions, structures and procedures.

3. In the text, the reference to "Compliance [...]" denotes the fact that there are various proposals as to the title of the compliance body or bodies that may be established, as Parties are yet to agree on this matter.

4. Efforts have been made to streamline procedural arrangements relating to facilitation or branch 1 and enforcement or branch 2. It was suggested that these procedural arrangements, as well as the procedure relating to Articles 6, 12 and 17, be located under the heading "Proceedings" in section III. As views of Parties continue to evolve on this issue, further discussion is needed on how these procedures would be integrated into the main body of the text. For the moment, they have been placed as attachments to the text. These attachments should be considered together with the text under "Proceedings" in section III.

5. It was proposed that, in accordance with Article 16 of the Protocol, the multilateral consultative process (MCP) referred to in Article 13 of the Convention, modified as appropriate, should be designated to address certain questions of implementation under the Protocol. As requested by Parties, the text of the MCP is contained in the annex for reference purposes.

C. Possible action by the Joint Working Group

6. Parties are invited to use the text presented in this note as the basis of their negotiations at the thirteenth sessions of the subsidiary bodies. The JWG may wish to request the co-chairmen to further develop the text on compliance for consideration during the resumed thirteenth sessions of the subsidiary bodies, with a view to completing its work in accordance with decisions 8/CP.4 and 15/CP.5.

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[1] FCCC/SBI/2000/5, annex III.

II. TEXT

[PROCEDURES AND MECHANISMS RELATING TO COMPLIANCE UNDER THE KYOTO PROTOCOL]

[A COMPLIANCE SYSTEM FOR THE KYOTO PROTOCOL]

Section I. General provisions

Objective

The objective of the [procedures and mechanisms relating to compliance] [compliance system] is to facilitate, promote [and enforce] compliance with the commitments of the Protocol, in the manner set out in the following provisions [, in pursuit of the ultimate objective of the Convention].

Nature

Option 1

The [procedures and mechanisms relating to compliance] [compliance system] shall be credible, fair, coherent, comprehensive, unified, effective, predictable, transparent and simple.

Option 2

The nature of the [procedures and mechanisms relating to compliance] [compliance system] should not be expressly provided for in the operative text, as its nature will be implicit from the content of the text. Alternatively, its nature could be reflected in the preamble or in a decision accompanying the adoption of the [procedures and mechanisms relating to compliance] [compliance system].

Principles

Option 1

The operation of the [procedures and mechanisms relating to compliance] [compliance system] shall [be guided by] [be based on] the [principles set out in Article 3 of the Convention] [and the recognized principles under international law] [and in particular shall]:

[1. Be proportionate, in that the procedures, mechanisms and consequences should take into account the cause, type, degree and frequency of non-compliance;]

[2. Adhere to the principle of common but differentiated responsibilities as defined in the Convention;]

[3. Treat all Parties that have undertaken the same commitments in an equivalent manner;]

[4. Be based on principles of efficiency and due process allowing Parties, and in particular the Party concerned, an opportunity for a full, fair and timely [consideration and] resolution of compliance-relating issues; [, including the presumption that a Party has complied with its commitments unless non-compliance is established;]]

[5. Preserve sovereign rights of Parties;]

[6. Provide for reasonable certainty; prevention of non-compliance; importance of domestic compliance and enforcement; creating appropriate incentives to comply; restoration to the environment of excess tonnes; automaticity; and transparency.]

Option 2

Principles governing the operation of the [procedures and mechanisms relating to compliance] [compliance system] should not be expressly provided for in the text, as they are contained in the Convention and the Protocol and could be implicit from the content of the text, or be reflected in the preamble or in a decision accompanying the adoption of the [procedures and mechanisms relating to compliance] [compliance system].

Scope of application

Option 1

The [procedures and mechanisms relating to compliance] [compliance system] shall apply to all commitments [contained] in [and under] the Protocol.

Option 2

The [procedures and mechanisms relating to compliance] [compliance system] shall apply to all commitments [contained] in [and under] the Protocol [as provided in this decision.] [, except where otherwise provided.]

Option 3

The [procedures and mechanisms relating to compliance] [compliance system] shall apply to all commitments [contained] in [and under] the Protocol, [and, as appropriate, the rules, guidelines, and procedures thereunder] [, except that all compliance and non-compliance issues with respect to the clean development mechanism (CDM) shall be dealt with exclusively by the executive board of the CDM].

Option 4

The [procedures and mechanisms relating to compliance] [compliance system] shall apply to [Articles 3.1, 4.1, 5, 7, 8, 6, 12, 17] [all commitments of Annex I Parties] [contained] in [and under] the Protocol. [All issues of compliance with other commitments [contained] in [and under] the Protocol shall be addressed and determined by the multilateral consultative process under Article 16.]

Functions

The Compliance [. . .][2] shall perform the following general functions, in accordance with the provisions of this text:

1. Provide advice and facilitate assistance;

2. Determine questions raised relating to application of any adjustment regarding an Annex I Party under Article 5.2 [, in the event of a dispute]; (*other paragraphs?*)

[3. Address specific questions arising under Articles [4,] 6 [, 12] and 17[3];]

[4. Address any [alleged] failure [by Annex I Parties] to meet eligibility requirements in and under Articles 6 [, 12] or 17;]

5. Address questions of compliance in and under the Protocol, [in particular, with [Article 3.1] [Articles 2 and 3] [Article 3.14] [Article 4.1];

6. Determine and [apply] [impose] outcomes and consequences.

Section II. Establishment and structure

Establishment

Option 1

1. A Compliance [. . .] is hereby established [, as a subsidiary body pursuant to Article 13.4 [(h)] [j] of the Protocol] [under Article 18] [, to address questions of implementation of commitments of [individual Annex I] Parties].

2. The Compliance [. . .] may establish such sub-groups or panels as it deems necessary to carry out its functions.

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[2] The formal title of the Compliance [. . .], whether compliance institution, compliance authority, compliance committee, compliance system, procedures and mechanisms relating to compliance, or other, is yet to be decided.

[3] Henceforth, every reference in the text to Article 17 stands as a reference to "[, if provided for by an amendment to the Protocol, Article]17".

[3. The multilateral consultative process referred to in Article 16 may be designated to address questions of implementation of the Protocol [of non-Annex I Parties].]

Option 2

1. A Compliance [. . .] is hereby established [, as a subsidiary body pursuant to Article 13.4 [(h)] [j] of the Protocol] [under Article 18] [to carry out the functions set out in section I, paragraph . . .].

[2. The multilateral consultative process referred to in Article 16 may be designated to address questions of implementation of the Protocol [of non-Annex I Parties].]

3. The Compliance [. . .] shall consist of two branches, to be designated as branch 1 and branch 2 [; dealing with facilitation and enforcement, respectively].[4]

4. Branch 1 shall [be responsible for the functions other than those set out in paragraph ...] [It shall promote compliance and] provide for advice and facilitate assistance to individual Parties [, and otherwise handle questions of implementation whose treatment may potentially lead to outcomes of [a non-mandatory] [facilitative] nature, set out in paragraph . .]. [Such functions shall constitute the multilateral consultative process referred to in Article 16.]

5. Branch 2 shall be responsible for assessing, determining and otherwise dealing with:

(a) Questions relating to non-compliance with [Articles 2 and 3] [Article 3.1] of the Protocol;

(b) [Alleged] failure [by Annex I Parties] to meet the eligibility requirements for one or more of the mechanisms under Articles 6 [, 12] and 17 [, including determining that a suspended Party may resume use of one or more such mechanism];

[(c) Failure to meet the requirements of Articles 5 and 7];

(d) The application of adjustments under Article 5.2 [, in the event of a dispute];

[(e) Failure to achieve the emission level under Article 4];

[(f) Failure to implement Article 3.14].

(g) Application of the outcomes set out in section IV, paragraph . . .;

[(h) Referring, at its discretion, to forward a case to branch 1 for further consideration.]

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[4] The formal titles of the branches, whether facilitative branch or consultative branch, enforcement branch or compliance branch, are yet to be decided.

[6. The Compliance [. . .] may establish such sub-groups or panels as it deems necessary to carry out its functions.]

Structure[5]

1. The [Compliance [. . .]] [branch 1] [branch 2] [panel] shall consist of [no more than][...] [10] [12] [15] [20] [21] [25] [30] members [to be assisted by a roster of experts [established on the basis of nominations provided by Parties]]. [It] shall be composed of experts of recognised competence in relevant fields, such as the scientific, technical, socio-economic and legal fields. [The Compliance [. . .] may draw upon such other expertise as it deems necessary.]

2. The members of the [Compliance [. . .]] [branch 1] [branch 2] [panel] shall be [nominated by Parties and shall act in their personal capacity] [representatives of Parties]. The [election] of members shall be based on [equitable geographical representation] [equal representation of the five United Nations regional groups] [one half to be [elected] from among Annex I Parties and one half to be [elected] from among non-Annex I Parties] [a larger proportional representation from among Annex I Parties] [within the group of Annex I and non-Annex I Parties representation shall be based on equitable geographical representation].

3. The members of the Compliance [. . .] shall be [elected] by the Conference of the Parties serving as the meeting of the Parties (COP/MOP) for [2] [3] [4] years. The COP/MOP shall [elect] [...] members for a term of [two] years and [..] members for a term of [..] years. At two-year intervals thereafter, the COP/MOP shall alternately [elect] [..] new members for a term of [..] years. Outgoing members may be [re-elected] for one consecutive term.

Section III. Procedures

Submission of questions to the Compliance [. . .]

[1. The secretariat upon receipt of the reports of the expert review teams under Article 8 shall submit such reports, including any questions of implementation indicated in the reports and listed by the secretariat, to the Compliance [. . .].]

2. Questions regarding implementation of the Protocol may also be submitted to the Compliance [. . .], by:

(a) Any Party with respect to itself;

(b) Any Party to [facilitation] [branch 1] with respect to another Party [, supported by corroborating information];

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[5] The composition and expertise of each branch will depend on the determination of options under section II, "Establishment".

[(c) The COP/MOP [, except that a Party may not participate in the decision with respect to a question directly concerning itself]];

[(d) A body of representatives established by the COP/MOP];

[(e) The executive board or other bodies established under Articles 6, 12 or 17];

[(f) The secretariat].

3. Submissions under paragraph 2 (b) – (f) shall be made available by the secretariat to the Party concerned within [two] weeks.

Preliminary examination of questions

Option 1

1. The [Compliance [. . .]] [[Chairperson] [Bureau] of the Compliance [. . .]] [Chairpersons of branches] [screening panel] [screening panel set up by the COP/MOP, with [equitable geographical representation][equal representation of the five United Nations regional groups]] [the Secretariat] shall forward questions submitted under paragraphs .... to the relevant [branch] [panel] in accordance with the mandate of that branch.

[2. The [Compliance [. . .]] [relevant branch] [screening panel] [screening panel set up by the COP/MOP with [equitable geographical representation][equal representation of the five United Nations regional groups]] shall make a preliminary examination of questions other than those raised by a Party concerning itself, to ensure that such questions are:

[(a) Supported by sufficient information;]

[(b) Not *de minimis* or ill-founded]; and

[(c) Referred to the Subsidiary Body for Implementation (SBI) or the Subsidiary Body for Scientific and Technological Advice (SBSTA) where multiple questions submitted raise similar types of issues (e.g. specific methodologies, interpretation of particular provisions of the Protocol)]]

[in accordance with agreed criteria adopted by the [Compliance [. .]] [COP/MOP]].

[3. Preliminary examination of questions shall be completed within [....] weeks after receiving [a question of implementation].]

[4. Following this preliminary examination, [branch 2] may forward a question within its mandate to [branch 1] for consideration on how to address that question. If the matter at issue has not been resolved within [. . .] weeks, [branch 1] shall return that question to [branch 2] for its *determination.]*

Option 2

[1. [The [Chairperson] [Bureau] of the Compliance [. . .]] [screening panel set up by the COP/MOP, with [equitable geographical representation][equal representation of the five United Nations regional groups]] may recommend to the Compliance [. .] that no further action shall be taken on a particular case.

2. Where the Compliance [. . .] approves the recommendation of the [Chairperson] [Bureau] [screening panel set up by the COP/MOP, with [equitable geographical representation] [equal representation of the five United Nations regional groups]], the Party concerned shall be informed forthwith.

3. The [Chairperson] [Bureau] of the Compliance [. . .] [in consultation with ...] shall determine whether the question shall be considered in accordance with:

(a) The facilitative procedure, or

(b) The enforcement procedure, [or]

[(c) The expedited procedure].

4. The [Chairperson] [Bureau] of the Compliance [. . .] [in consultation with ...] shall nominate a panel to consider the case, consisting of [at least] [. . .] members of the Compliance [...], with relevant expertise and including a [. . .] majority of members of the Compliance [. . .] nominated from among the Parties included in Annex I.]

Option 3

1. Prior to the commitment period, the Compliance [. . .] shall, in accordance with the expedited procedure in attachment III:

(a) Review the reports of the expert review teams and decide whether a Party has met the eligibility criteria for participation in the mechanisms; and

[(b) Resolve any disagreements that may arise between the expert review team and the Party concerned regarding that Party's base year emissions and the calculation of its assigned amounts under Articles 3.7, 5 and 7.]

2. During the commitment period, the Compliance [. . .] shall:

(a) In accordance with the expedited procedure in attachment III:

(i) Review the reports of the expert review teams and decide whether a Party has met the eligibility criteria for participation in the mechanisms; and

(ii) [Resolve any disagreements that may arise between the expert review team and the Party concerned regarding adjustments under Articles 5 and 7.]

(b) Review and consider any other questions referred to it concerning a Party's implementation of its commitments under the Protocol in accordance with the procedure in attachment I.

3. At the end of the true-up period the Compliance [. . .] shall, on its own initiative, or, by negative consensus upon the request of a Party, decide whether to establish an enforcement panel to carry out the procedure in attachment II, in the following manner:

(a) An enforcement panel shall be established by the Compliance [. . .] at its first meeting following the receipt by the secretariat of a request from a Party, unless the Compliance [. . .] decides by consensus not to establish a panel;

(b) If the Compliance [. . .] concludes that it has sufficient corroborating information to demonstrate the non-compliance of a Party with its commitments under Article 3.1, it shall establish an enforcement panel on its own initiative;

(c) When the Compliance [. . .] has established an enforcement panel on its own initiative, the matter shall be taken forward by the chairperson of the Compliance [. . .]. When the procedure has been initiated at the request of a Party the matter shall be taken forward by that Party;

(d) Each enforcement panel shall be composed of three well-qualified experts, selected by the Executive Secretary from a roster nominated by the COP/MOP.

Proceedings of the Compliance [. . .][6]

The procedures contained in attachments I, II and III are to be incorporated into this part.

1. *Decision-making*

Option 1

The members of the [Compliance [. . .]] [branch 1] [branch 2] [panel] shall make every effort to reach agreement on its [decisions] [recommendations] by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the [decision] [recommendation] shall as a last resort be adopted by a [three-quarters majority] vote of [the Parties] [members] present and voting at the meeting. [, provided that adoption of any [decision] [recommendation] shall have a quorum of [. . .].]

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[6] The proceedings of the Compliance [. . .] may be different, and may need to be provided for, in respect of the operation of facilitation/branch 1 and enforcement/branch 2, or other procedures.

Option 2

The [Compliance [. . .]] [branch 1] [branch 2] [panel] shall make its [decision] [recommendation] [by consensus] [by [...] majority of the members of the [Compliance [. . .]] [branch1][branch 2] [panel] present and voting] [by double majority of the members from Annex I Parties and the members from non-Annex I Parties] [according to the rules of the COP/MOP].

2. *Participation of Parties*

The Party concerned shall be entitled to [nominate a] [designate one or more] person [s] to represent it during the consideration of its case by the [Compliance [. . .]] [branch 1] [branch 2] [panel], [and shall have the right through its representative to call, require the attendance of, and question witnesses.] The Party concerned shall [be given the opportunity] [be entitled] to comment on [any information used by the [Compliance [. . .]] [branch 1] [branch 2] [panel] as a basis for its deliberation and on] the draft conclusions and recommendations of the [Compliance [. . .]] [branch 1] [branch 2] [panel] but shall not take part in the drafting and adoption of its [decision] [recommendation] on that matter.]

3. *Avoidance of conflict of interest*

No member of the [Compliance [. . .]] [branch 1] [branch 2] [panel] who is a national of a Party that is involved in a matter before the Compliance [. . .] shall take part in the [consideration,] drafting and adoption of any decision [on that matter] [in which they have a direct or indirect interest].

4. *Sources of information*

(a) The Compliance [. . .] shall base its deliberations on:

(i) Reports by expert review teams under Article 8 of the Protocol;

(ii) Information provided by the Party or Parties concerned;

[(iii) Relevant reports of the COP/MOP and its subsidiary bodies.]

[(b) The Compliance [. . .] may [seek] [receive] additional information from:

(i) Other experts and organizations [qualified in matters covered by the Protocol][, as appropriate]; and

(ii) Any other source that it considers to be appropriate.]

[(c) All information received by the Compliance [. . .] with regard to a specific question [and its origins,] shall be available to the Party concerned;]

[(d) The Compliance [. . .] shall ensure the confidentiality of any information that it has received in confidence.]

5. [The COP/MOP shall develop] [This decision shall set] detailed rules for the operation of the [Compliance [. . .]] [branch 1] [branch 2] [panel], including additional rules relating to other procedural matters, as well as proceedings for appeal set out in paragraph ....

Appeal

Option 1

1. An appeal procedure shall be available for [all] decisions [involving outcomes or consequences of [a mandatory] [enforcement] nature [relating to non-compliance with Article 3.1]].

2. The appeal procedure shall be carried out by [a [standing] [ad hoc] appellate body] [the COP/MOP]. [The COP/MOP may agree by consensus to override a decision on appeal.] [The Party whose compliance or non-compliance is under consideration may not participate in any decision on appeal directly concerning that Party.]

Option 2

There should be no procedure for appeal.

COP/MOP

1. The Compliance [. . .] shall report on all its activities to each ordinary session of the COP/MOP.

2. The COP/MOP shall consider reports [and conclusions] of the Compliance [...], [including any issues regarding implementation [as well as trends of problems] that may have implications for the work of the subsidiary bodies];

3. The COP/MOP [shall] [may] [take note of] [accept] [modify] [or reject] the [reports] [decisions] of the Compliance [. . .], [unless the COP/MOP decides by consensus not to do so.] [, except that a Party that is a subject of appeal may not vote on appeal.]

[4. The COP/MOP [shall] [may] provide [general policy] guidance [or background] to the Compliance [. . .] [branch 1].]

[5. The [COP/MOP] [panel established by the COP/MOP, with [equitable geographical representation][equal representation of the five United Nations regional groups]] shall determine which questions regarding implementation of Parties shall be pursued in accordance with section III, paragraph ...]

True-up period

1. A true-up period is defined as a period of [[36] months following the end of the commitment period] [[one] month after the publication of the final report of the expert review of the inventory of the last Party to be reviewed for the last year of the commitment period] [other].

2. During the true-up period, in order to fulfil its commitments under Article 3.1, any Party may:

[(a) Continue to acquire [and transfer] ERUs, CERs and AAUs under Articles 6, [12] and 17 from the preceeding commitment period (provided it has not been found ineligible to participate in any mechanism under those Articles)];

[(b) Make a voluntary payment into a climate change fund(s)].

Section IV. Outcomes and consequences [of non-compliance or potential non-compliance, taking into account the implications of Article 18]

1. The [Compliance [...]] [branch 1] [panel] may, depending upon the particular case before it, [decide] [make recommendations] upon one or more of the following [outcomes and] [facilitative] consequences, including:

(a) Provision [of] [for] advice and [facilitating] assistance to individual Parties regarding implementation of the Protocol;

[(b) Facilitation of financial and technical assistance, including technology transfer and capacity-building, to [non-Annex I] Parties;]

[(c) Making recommendations];

(d) Publication of [non-compliance] [or potential non-compliance;]

[(e) Issuing of cautions;]

[(f) [After exhausting all the facilitative outcomes,] initiation of the enforcement procedure set out in attachment II]

[2. [Mandatory] [enforcement] [consequences] shall not be applied to non-Annex I Parties.]

[3. The [Compliance [. . .]] [branch 2] [panel] shall apply adjustments, where necessary.]

4. The [Compliance [. . .]] [branch 2] [panel], in the case where it has determined that [a Party] [an Annex I Party] has failed to meet certain eligibility requirements relating to the mechanisms under Articles 6 [, 12] and 17, shall [make a recommendation regarding] [suspend] the [Annex I] Party's eligibility for the mechanisms in question, in accordance with the provisions in or under Articles 6 [, 12] [and] [or] Article 17, as applicable.

Or

If an [Annex I] Party is found by the [Compliance [. . .]] [branch 2] [panel] to be in breach of any of the eligibility requirements under Articles 6 [, 12] [and] [or] 17, [that Party] [and other members of that Party's Article 4 arrangement] may not [, for the mechanisms in question]:

(a) [Transfer or] acquire parts of assigned amount; [or]

(b) [Transfer or] acquire emission reduction units; [and][or]

(c) Acquire certified emission reductions;

in accordance with the provisions of Article 3, until the [Compliance [. . .]] [branch 2] [panel] is satisfied that the Party is in full compliance with the relevant requirements.

5. If the [Compliance [. . .]] [branch 2] [panel] determines that a Party, following the true-up period, has not complied with [Article 3] [Article 3.1] [Article 4.1] of the Protocol, it shall [apply] [impose] [request the Party to choose] [one of] the following consequences [, or a combination thereof] [,taking into account the cause, type, degree and frequency of such non-compliance] [unless the Party can demonstrate to the satisfaction of the [Compliance [. . .]] [branch 2] [panel] that the cause, type, degree or frequency of its non-compliance makes it inappropriate to do so]:

[(a) Publication of non-compliance

The [Compliance [. . .]] [branch 2] [panel] shall notify all Parties to the Protocol of the details of the Party's non-compliance; and publish its determination, including the reasons for it [as well as the summary of reasons presented by Parties] on the UNFCCC web site.] [The publication shall contain any explanatory notes provided by the Party concerned.]

[(b) Recommendation of policies and measures

Recommend policies and measures [, taking into account Article 2.3 of the Protocol] [with the aim..].]

[(c) Restoration of excess tonnes

Option 1

Determine that [1.3] [1.x] [x] [times] the [number of] excess tonnes shall be deducted from the Party's assigned amount for the commitment period following the period for which the non-compliance with Article 3.1 occurred.

Option 2

Purchase units of assigned amount originating in the first commitment period and apply them towards meeting their Article 3.1 commitments [at a penalty rate of 1.x]; or

Purchase units of assigned amount originating in the second commitment period and apply them to meeting their Article 3.1 commitments [at a penalty rate of 1.y]; or

Purchase a combination of units of assigned amount originating in both the first and second commitment periods and apply them toward meeting their Article 3.1 commitments [at their respective penalty rates, as set out above].]

[(d) Compliance action plan

Option 1

The Party in question shall, in order to restore [1.x] [times] the excess emissions, within [three] months of the determination of the [Compliance [. . .]] [branch 2] [panel], develop and commit itself to a compliance action plan [, taking into account Article 2.3 of the Protocol,] approved by the [Compliance [. . .]] [branch 2] [panel], which shall include, *inter alia*:

(i) An analysis of the reasons for the Party's non-compliance;

(ii) Policies and measures that the Party intends to implement and an analysis of their expected impact on the Party's greenhouse gas emissions;

(iii) A quantified assessment of the use of each of the mechanisms under Articles 6, [12] and 17, and Article 4 during the commitment period in which the plan is implemented;

(iv) A declaration not to make transfers under Article 3, paragraph 11, for the duration of the implementation of the compliance action plan;

(v) Detailed information on the economic dimension of the implementation of any action under (ii) or (iii) above;

(vi) A timetable for implementing the measures within a time-frame not exceeding [three] years, including clear benchmarks for measuring annual progress in the implementation;

(vii) An assessment of the compatibility of the compliance action plan with the strategy developed by the Party to comply with its obligations during the commitment period in which the compliance action plan is implemented.

Measures implemented under the compliance action plan shall not contribute to any Party's compliance with its quantified emission limitation or reduction commitments during the commitment period in which the compliance action plan is implemented.

The Party concerned shall submit a progress report on the implementation of the compliance action plan to the [Compliance [. . .]] [branch 2] [panel] annually no later than 15 April. On the basis of the progress report, the [Compliance [. . .]] [branch 2] [panel] may decide on further recommendations, measures or consequences, as appropriate.

Option 2

The Party in question shall, [within a specific time period] after the determination of non-compliance, submit to the [Compliance [. . .]] [branch 2] [panel] a compliance action plan setting forth one or more means by which it intends to restore the tonnes in question.

The means may include, for example, use of one or more mechanisms under Articles 6 [, 12] and 17, particular measures, and non-allocation of tonnes under a domestic cap-and-trading system [, and use of a voluntary compliance fund].

The Party concerned shall submit a progress report on the implementation of the compliance action plan to the [Compliance [. . .]] [branch 2] [panel] annually no later than [..]. On the basis of the progress report, the [Compliance [. . .]] [branch 2] [shall] [may] determine whether the requisite tonnes have been restored.

In the case where [Compliance [. . .]] [branch 2] [panel] determines [within a specific time-frame,] that some or all of the requisite tonnes have not been restored, it shall deduct the remaining tonnes from the Party's assigned amount for the commitment period following the period for which the non-compliance with Article 3.1 occurred.]

[(e) *Restrictions on the use of the mechanisms*

Option 1

Loss of access to the mechanisms under Articles 6 [, 12] and 17

The Party may not make any transfer or acquisition under Article 3 above a level and for a period of time to be determined by the [Compliance [. . .]] [branch 2] [panel].

Option 2

Loss of eligibility to transfer parts of assigned amounts

Until the Party has demonstrated to the [Compliance [. . .]] [branch 2] [panel] that it will have a surplus of assigned amount in the subsequent commitment period, its eligibility to transfer parts of assigned amount under Article 17 shall be suspended.]

[(f) *Compliance fund*

[A compliance fund is hereby established.]

[Each] [Every] [The] Party [shall] [may] make payments into the compliance fund at a rate that equals [...] per excess tonne of carbon equivalent multiplied by a factor of [1.x][x].

The compliance fund shall be administered [nationally] [or] [internationally].

The fund shall disburse its income and any interest it earns to reduce anthropogenic emissions of greenhouse gases. The emissions reductions achieved shall not contribute to any Party's compliance with its quantified emission limitation or reduction commitments.]

[(g) *Financial penalty]*

[(h) *Suspension of rights and privileges*]

[(i) *Application of Article 4.5 and 4.6*

[If one or more Parties operating under Article 4 are found not to be in compliance with Articles 5 and 7, each Party to an agreement under Article 4 shall be responsible for its own level of emissions set out in the agreement.

In accordance with Article 4.6 of the Protocol, any non-compliance consequences under this paragraph shall apply to both the regional economic integration organization and any Party that has exceeded its level of emissions as notified in accordance with Article 4.

If one or more Parties operating under Article 4 have been found to have exceeded their respective levels of emissions, the Parties operating under such agreement shall not be able to operate under an Article 4 agreement with respect to the commitment period following the period for which the non-compliance with Article 3.1 occurred; and Annex B commitments shall apply.

If one or more Parties operating under Article 4 have been found to have exceeded their respective levels of emissions, another Party operating under that Article 4 agreement shall be able to carry over the assigned amount under Article 3.13 only to the extent that the difference between its emissions and its assigned amount under Article 3 is greater than the amount by which the non-complying Parties under Article 4 have exceeded their respective levels of emissions.]

[If one or more Parties operating under Article 4 should fail to achieve their total combined level of emission reductions set out in their Article 4 agreement, a Party operating under that agreement shall not be entitled to add units of assigned amount originating in any other Party, whether gained under the arrangement itself, any other agreement or under Articles 3.3, 3.4, 6, 12 or 17, in meeting its own level of emissions set out in the agreement.]]

[(j) *Compliance reserve]*

Section V. Other provisions

Secretariat

The secretariat shall perform the following functions:

(a) Channel information to the Compliance [...];
(b) Service the meetings of the Compliance [...];
(c) Act as the channel of communication with other Protocol bodies;
[(d) Refer questions to the Compliance [...]]

Relationship with Article 16 of the Protocol

[The multilateral consultative process under Article 16 shall provide advice and facilitate assistance [to non-Annex I Parties] with respect to issues relating to their compliance/non-compliance under the Protocol.] [other]

Relationship with Article 19 of the Protocol

The Compliance [. . .] shall operate without prejudice to Article 19 of the Protocol. [, decisions under Article 12].

[Evolution] [Modification] [Amendment]

[[Subject to Article 18], the [procedures and mechanisms relating to compliance] may be modified by consensus of the Parties to the Protocol, taking into account any amendments to the Protocol, decisions of the COP/MOP and experience gained with the working of the process. [7]]

Adoption of procedures and mechanisms relating to compliance[8]

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[7] Depending upon the legal form in which the regime is adopted.

[8] Formal steps for the adoption of any procedures and mechanisms relating to compliance would need to be decided.

[Attachment I

**PROCEDURAL ARRANGEMENTS RELATING TO
[FACILITATION] [BRANCH 1]**

Option 1

Process

1. The [Compliance [. . .]] [branch 1] [panel] shall review and consider questions submitted to it with a view to securing an amicable resolution of the matter. It shall decide, based upon the particular question, Party and circumstances, how best to address the question.

2. The Party concerned may participate in the consideration of the question; it may not take part in the elaboration of the conclusions.

Sources of information

3. The [Compliance [. . .]] [branch 1] [panel] may request information from relevant sources and seek advice from experts. Intergovernmental and non governmental organizations with relevant factual and technical information may submit such information to the [Compliance [...]] [branch 1] [panel]. The [Compliance [. . .]] [branch 1] [panel] shall make information received available to the Party concerned.

Resolution of questions

4. The [Compliance [. . .]] [branch 1] [panel] shall decide whether [to apply one or more outcomes specified in section IV, paragraph 1] [to provide for advice and facilitate assistance].

5. The [Compliance [. . .]] [branch 1] [panel] shall forthwith notify the Party concerned of its conclusions and any outcomes, [and make it available to all the other Parties and to the public].

Option 2

The multilateral consultative process referred to in Article 16 may be designated to address questions of implementation of the Protocol [of non-Annex I Parties].

(For the text of the multilateral consultative process, see annex below)

[Attachment II

PROCEDURAL ARRANGEMENTS RELATING TO [ENFORCEMENT] [BRANCH 2]

Notification

1. After the preliminary examination, the [branch 2][panel] shall notify the Party and, in the event of a decision to proceed, include a statement identifying the questions of implementation that will be assessed.

Participation of parties and conflict of interest

See paragraphs 2 and *3 under heading "Proceedings of the Compliance [. . .]" of section III.*

Written submission

2. Within [a period of time] after the issuance of the notification of questions to be assessed, the Party concerned may make a written submission to the [branch 2][panel] in which that Party presents its views.

Sources of information

3. The [branch 2] [panel] may request information from any source it deems relevant. [Other Parties, non-governmental organizations, and others may provide relevant information to the [branch 2] [panel]].

4. The [branch 2] [panel] shall take into account the relevant reports of Article 8 and any information provided by the Party concerned. The [branch 2] [panel] may take into account information from other sources it considers appropriate.

5. Any information received by the [branch 2] [panel] shall be made available to the Party concerned and, subject to any rules relating to confidentiality, to the public. The Party concerned shall be afforded the opportunity to comment in writing on this information, including any rebuttals of such information.

(Issues relating to confidentiality shall be dealt with in the rules of procedure)

6. Information to be considered by the [branch 2] [panel] shall be provided in sufficient time before the preliminary finding, to enable the Party to have a reasonable opportunity to comment.

Hearing

7. If so requested in writing by the Party concerned, the [branch 2] [panel] shall hold a hearing at which the Party concerned shall have the opportunity to present its views. The Party concerned may present expert testimony at the hearing.

8. The [branch 2] [panel] may put questions to the Party concerned either in the course of such a hearing or at any time in writing.

Preliminary finding

9. Within [...] weeks from receipt of Party's written submission, or within [...] weeks from the date of the hearing if it has been held, or within [...] weeks from the issuance of the notification if the Party has not provided a written submission, whichever is the latest, the [branch 2][panel] shall:

[(a) Decide that the Party has fulfilled the relevant commitments in and under the Protocol and make that decision available to all the other Parties and to the public; or

(b) Make a preliminary finding that the Party is in breach of one or more of its commitments.]

Or

[(a) Issue a preliminary finding; or

(b) Make a final decision

The preliminary finding or the final decision shall contain the conclusions, and reasons therefore, given by the [branch 2][panel]].

It shall forthwith notify the Party concerned of its decision or preliminary finding.

Final decision

10. Within [...] weeks from the date of issuance of a preliminary finding, the Party concerned may provide a further written submission. If that Party does not submit comments within that period of time, the [branch 2][panel] shall issue a final decision confirming its preliminary finding.

11. If that Party submits comments, the [branch 2] [panel] shall, within [...] weeks from the date on which it received the comments, consider them and

[decide :

(a) That the Party has fulfilled the relevant commitments in and under the Protocol; or

(b) That the preliminary finding is confirmed, in whole or in part.]

Or

[Make a final decision.]

It shall forthwith notify the Party concerned of its final decision and make it available to all the other Parties and to the public.

12. In a case where the [branch 2][panel] has determined that a Party, following the true-up period, is not in compliance with Article 3.1, it shall [impose one or more of the consequences set out in section IV, paragraph ...][apply the outcome specified in section IV, paragraph ...]. In addition, the [branch] [panel] may [apply one or more of the consequences set out in section IV, paragraph 1][decide to forward the case to the facilitative branch for further consideration].

Quorum and voting rule

13. The adoption of a preliminary finding or a final decision of the [branch 2] [panel] requires a quorum of [...].

14. The [branch 2] [panel] shall make every effort to reach preliminary findings and final decisions by consensus. If all efforts at consensus have been exhausted and no agreement reached, the preliminary finding or decision shall as a last resort be adopted by a majority of at least [three fourths] of the members of the [branch 2][panel] present and voting.

Rules of procedure

15. The COP/MOP may [prepare and] adopt rules of procedure, consistent with the procedure above, for the operation of the Compliance [...].

(The expedited procedure with respect to questions under Articles 6,12 and 17 is to be included in this procedure.)]

[Attachment III

EXPEDITED PROCEDURE WITH RESPECT TO QUESTIONS UNDER ARTICLES 6, 12 AND 17

Option 1

1. The expedited procedure with respect to questions under Articles 6 [, 12] and 17 shall be dealt with by branch 2.

2. When considering and deciding upon cases relating to eligibility requirements for the mechanisms under Articles 6 [, 12] and 17, [branch 2] shall conduct its proceedings in an expedited manner,[9] while respecting due process. Specific time-frames for such proceedings shall be [decided by the COP/MOP].

3. [Branch 2], in the case where it has determined that a Party does not meet the eligibility requirements for one or more of the mechanisms set forth in or under Articles 6 [, 12] and 17, shall apply the outcome set out in section IV, paragraph....

[4. [Branch 2], after determination of non-compliance with the eligibility requirements for one or more of the mechanisms set forth in or under Articles 6 [, 12] and 17, may decide to forward the case to [branch 1] to assist the Party in question in meeting the relevant eligibility requirements.]

[5. [Branch 2] shall reinstate a Party's eligibility upon its determination, either at the request of the Party in question or at the request of [branch 1] where a case has been forwarded to it by [branch 1], that the Party meets the relevant eligibility requirements.]

Option 2

1. Prior to the start of the first commitment period, the Compliance [...] shall, within eight weeks of the date of completion of a review under Article 8, and based on the information submitted by the expert review teams, eligibility criteria established under..., and any other relevant information:

(a) Decide that the Party has fulfilled the eligibility criteria set out in ...; or

(b) Make a preliminary finding that the Party does not fulfil one or more of the criteria.

It shall forthwith inform the Party of its decision or preliminary finding and make it available to all the other Parties.

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[9] The exercise of the expedited procedure might modify certain provisions with respect, for example, to certain time-frames, written submissions, hearings, means of communication and appeals contained in attachment II.

2. During the first commitment period, the Compliance [...] shall, based on the information submitted by the expert review teams, review any other relevant information, make decisions on the continuing observance of eligibility criteria established under ... for transfers and acquisitions under the provisions of Article 3.

3. The Compliance [...] shall:

(a) Within six weeks of the date on which the submission of the annual greenhouse gas inventory and the annual greenhouse gas inventory report of a Party becomes due, or on which the secretariat registers receipt of such a submission, whichever shall be the earlier, or

(b) Within six weeks of being notified in writing by an expert review team of a problem under paragraph ...

decide that the Party has fulfilled the eligibility criteria or make a preliminary finding that the Party is in breach of one or more of the criteria. It shall forthwith inform the Party of its decision or preliminary finding and make it available to all the other Parties.

4. If a Party in respect of which a preliminary finding has been made does not submit comments on the finding in writing to the Compliance [...] within four weeks of the date on which it was informed of it, the Compliance [...] shall forthwith confirm its preliminary finding and impose consequences in accordance with section IV, paragraph ...

5. If a Party in respect of which a preliminary finding has been made submits comments on the finding in writing to the Compliance [...] within four weeks of the date on which it was informed of it, the Compliance [...] shall, within four weeks of the date on which it received the comments, consider them and any representations made in due time by any other Party and:

(a) Decide that the Party has fulfilled the eligibility criteria for each of the mechanisms in question; or

(b) Confirm, in whole or in part, its preliminary finding and apply outcomes in accordance with paragraph ...

It shall forthwith inform the Party of its decision or preliminary finding and make it available to all the other Parties.

Option 3

General

1. The Compliance [...] [branch of the Compliance [...]] shall consider questions with respect to the mechanisms under Articles 6 [, 12] and 17, and for this purpose shall elect a chairperson and a vice-chairperson. In addition, it shall determine the order by which a chairperson is to be chosen in the event of both the chairperson and the vice-chairperson not being available.

2. The [COP/MOP] [Compliance [...]] [branch of the Compliance [...]] shall agree upon a list of experts from which substitute members may be drawn when some of the members of the [Compliance [...]] [branch of the Compliance [...]] are not available during the period of time to consider a question relating to the mechanisms under Articles 6 [, 12] and 17. The experts in the list shall be divided into two groups; those from Annex I Parties and those from non-Annex I Parties. For each group, the [COP/MOP] [Compliance [...]] [branch of the Compliance [...]] shall agree upon an order in which experts are drawn when needed.

3. All the communications in the expedited procedure shall be in English. As far as possible they should be in electronic form, or by fax.

Process and schedule

4. The expedited process shall be completed within eight weeks. The approximate time allocated for each step shall be as follows:

(a) Screening: one week;

(b) Selection of members to consider the question: one week;

(c) Initial comments by Parties: one week;

(d) E-mail discussion: two weeks;

(e) Drafting of the conclusion with reasons by the chairperson: one week;

(f) Opportunity to make objections to the [Compliance [...]] [branch of the Compliance [...]] in respect of its conclusion: one week;

(g) Preparation for the [meeting] [discussion] [hearing]: one week. The [meeting] [discussion] [hearing] shall be scheduled after receipt of comments, if the initial communications had failed to reach a conclusion.

Information to Parties

5. The Party in question shall be informed of every step in the process.

6. The Party shall have every opportunity to provide its views, and/or additional information, during the period of initial comments.

Conclusion

7. The [Compliance [...]] [branch of the Compliance [...]] shall make every effort to reach agreement by consensus. If all efforts at consensus have been exhausted, and no agreement

reached, the decision shall, as a last resort, be adopted by a vote [by a double majority of the members of Annex I Parties and the members of non-Annex I Parties].

8. The chairperson shall send decisions, with reasons, to the Parties through the secretariat.

Appeal

9. The Party concerned may appeal the decision of the [Compliance [...]] [branch of the Compliance [...]] in accordance with the procedure set out in section III, paragraph....

Option 4

1. The eligibility panel shall deal, in an expedited manner, with all questions relating to compliance of Annex I Parties with questions specific to mechanisms under Articles 6 [,12] and 17. Disputes between the executive board (or other body established for the purposes of the other mechanisms) and a Party relating to the allocation of certified emission reductions shall be referred to the eligibility panel.

2. The eligibility panel shall determine appropriate provisional measures to safeguard the functioning of the mechanisms under Articles 6 [, 12] and 17.

3. The eligibility panel shall determine the most suitable consequence or outcome to deal with a particular case.]

Annex

MULTILATERAL CONSULTATIVE PROCESS[10]

TERMS OF REFERENCE

Establishment

1. Pursuant to Article 13 of the United Nations Framework Convention on Climate Change, the Conference of the Parties hereby establishes a multilateral consultative process ("the process") in the form of a set of procedures to be served by a standing Multilateral Consultative Committee ("the Committee").

Objective

2. The objective of the process is to resolve questions regarding the implementation of the Convention, by:

(a) Providing advice on assistance to Parties to overcome difficulties encountered in their implementation of the Convention;

(b) Promoting understanding of the Convention;

(c) Preventing disputes from arising.

Nature

3. The process shall be conducted in a facilitative, cooperative, non-confrontational, transparent and timely manner, and be non-judicial. Parties concerned shall be entitled to participate fully in the process.

4. The process shall be separate from, and without prejudice to, the provisions of Article 14 of the Convention (Settlement of Disputes).

How issues would be taken up

5. Questions regarding the implementation of the Convention may be raised, with supporting information, by:

(a) A Party with respect to its own implementation;

(b) A group of Parties with respect to their own implementation;

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[10] FCCC/CP/1998/16/Add.1.

(c) A Party or a group of Parties with respect to the implementation by another Party or group of Parties;

(d) The Conference of the Parties.

Mandate of the Committee

6. The Committee shall, upon a request received in accordance with paragraph 5, consider questions regarding the implementation of the Convention in consultation with the Party or Parties concerned and, in light of the nature of the question, provide the appropriate assistance in relation to difficulties encountered in the course of implementation, by:

(a) Clarifying and resolving questions;

(b) Providing advice and recommendations on the procurement of technical and financial resources for the resolution of these difficulties;

(c) Providing advice on the compilation and communication of information.

7. The Committee shall not duplicate activities performed by other Convention bodies.

Constitution

8. The Committee shall consist of [10] [15] [25] members. It shall be composed of persons nominated by Parties who are experts in relevant fields, such as those of science, socio-economics and the environment. The Committee may draw upon such outside expertise as it deems necessary.

9. [The members of the Committee shall be designated by the Conference of the Parties for three years, based on equitable geographical distribution[11] and the principle of rotation [with one half to be designated by Annex I-Parties and one half to be designated by non-Annex I Parties][12]. Outgoing members may be re-appointed for one immediate consecutive term. The Chairmen of the subsidiary bodies of the Convention may participate in the meetings of the Committee as observers.]

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[11] The G77 and China stated that they uphold the principle of "equitable geographical distribution" which is a well-established practice within the United Nations and strongly objected to the placement of the phrase "equitable geographical distribution" in square brackets by some Parties.

[12] Some Parties stated that the phrase "equitable geographical distribution" was not acceptable and that the following language should be inserted after the word "rotation": with one half to be designated by Annex I Parties and one half to be designated by non-Annex I Parties. These Parties also noted their view that "equitable geographical distribution" was not a well-established practice and was not applicable in this context.

Deliberations

10. The Committee shall meet at least once a year. Meetings of the Committee shall, whenever practicable, take place in conjunction with sessions of the Conference of the Parties or its subsidiary bodies.

11. The Committee shall report to each ordinary session of the Conference of the Parties on all aspects of its work, with a view to the Conference of the Parties taking whatever decisions it considers necessary.

Outcome

12. The conclusions and any recommendations of the Committee shall be sent to the Party or Parties concerned for its, or their, consideration. Such conclusions and recommendations shall be consistent with the mandate as described in paragraph 6 above. They may include:

(a) Recommendations regarding co-operation between the Party or Parties concerned and other Parties to further the objective of the Convention; and

(b) Measures that the Committee deems suitable to be taken by the Party or Parties concerned for the effective implementation of the Convention.

13. The Party or Parties concerned shall be given the opportunity to comment on the conclusions and recommendations. The Committee shall, in addition, forward its conclusions and recommendations and any written comments of the Party or Parties concerned to the Conference of the Parties in due time before its ordinary sessions.

Evolution

14. These terms of reference may be amended by the Conference of the Parties to take account of any amendment to the Convention, decisions of the Conference of the Parties or experience gained with the working of the process.

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